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Steuerer v. Richards Appellant's Brief Dckt. 39274

IN THE SUPREME COURT OF THE STATE OF IDAHO

DONALD E. STEUERER, Plaintiff-Respondent, v. N.E.M. RICHARDS, a.k.a. NICKY, RICHARDS, and JOHN DOES I-V, Defendant-Appellant.	)	Docket No: 39274-2011

APPELLANTS' BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LINCOLN
CASE NO. CV-2010-212

The Honorable John K. Butler, District Judge, Presiding

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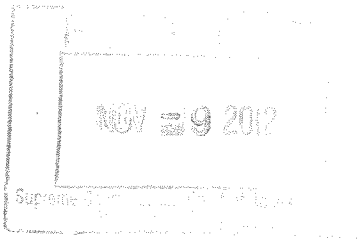

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1. Whether the District Court erred in finding deeds, absolute in form, the terms of which were not ambiguous, were in fact mortgages, when the Court failed to recognize and apply the complete, substantive legal standards?

2. Whether the District Court erred in finding the transaction between the parties to be an equitable mortgage without considering whether plaintiff had standing, or whether the action was barred by laches and estoppel?

3. Whether Appellant is entitled to attorney fees on appeal pursuant to Idaho Code Sections 12-120(3) and Idaho Appellate Rule 41(a)?

STATEMENT OF THE CASE

Nature of the Case

This is an appeal by Defendant, N.E.M. Richards from an Order of the District Court finding two deeds, absolute in form, the terms of which were not ambiguous, to be an equitable mortgage.

Course of Proceedings and Disposition Below

On September 28, 2010, Plaintiff, Donald E. Steuerer, filed a Complaint to Quiet Title to Real Property against Defendant, N.E.M. Richards. Mr. Steuerer alleged in his complaint that deeds executed and delivered by him to N.E.M. Richards, relating to certain real property located within the City of Shoshone, were intended not to be absolute transfers, but rather to be mortgages. Mr. Steuerer requested judgment quieting title to himself; declaring the deeds to be mortgages, and for the Court to determine the indebtedness owed by himself to Defendant Richards. (R. Vol. I, pp. 26-31)

On November 5, 2010, Defendant, by Timothy Stover, Attorney at Law, filed an Answer admitting Plaintiff executed and delivered deeds absolute on their face, denying the deeds were intended as mortgages and propounding a host of affirmative defenses. (R. Vol. I, pp. 35-38) The Idaho Supreme Court Data Repository indicates the filing fee for said answer was paid for by Robert E. Williams, attorney for Plaintiff. (R. Vol. I, p. 20) The Court entered its Scheduling Order on January 18, 2011, setting the matter for trial on July 13, 2011, wherein all pre-trial motions were ordered to be filled no less than ninety (90) days before trial. (R. Vol. I, p. 46-53) Defendant Richards submitted to deposition on March 14, 2011, represented by Attorney Stover. Attorney Stover withdrew as counsel for Defendant, on March 15, 2011. (R. Vol. I, pp. 64-65)

Attorney, Allison E. Brace, thereafter, on April 1, 2011, entered her appearance on behalf of Defendant Richards. (R. Vol. I, p. 68) Richards, represented by Brace, responded to written discovery requests on April 29, 2011, which was followed by Plaintiff's Motion for Summary Judgment, set for hearing on June 21, 2011. Attorney Brace, nor Attorney Stover conducted any form of discovery on behalf of Defendant. No response to Plaintiff's Motion for Summary Judgment was prepared or filed by Attorney Brace. (R. Vol. I, pp. 20-25)

On June 16, 2011, present counsel filed a *Notice of Appearance, Motion to Continue and Reset Hearing on Plaintiff's Motion for Summary Judgment and Trial Setting.* On June 20, 2011 counsel filed a *Motion for Leave to File Late Response to Plaintiff's Motion for Summary Judgment, Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment, Affidavit of N.E.M. Richards in Opposition to Plaintiff's Motion for Summary Judgment, Motion to Shorten Time*, and a *Notice of Hearing*, setting the foregoing for argument the following day. On June 21, 2011 the Court denied all pending motions, but amended its Scheduling Order to allow deposition of Plaintiff prior to trial. (R. Vol. I, pp. 22-23)

The issues were tried to the Court on July 13, 2011. The only witnesses to testify were Plaintiff, Donald E. Steuerer, Defendant N.E.M. Richards and Donn Bordewyk, the General Manager of the Valley Co-Ops, Incorporated. Documentary Evidence offered was admitted by stipulation of the parties. In addition to those exhibits included on the parties' Exhibit Lists, Defendant offered original check registers, original check stubs, and a copy of check written by Defendant Richards to Plaintiff. (Tr. Vol. I) Post-trial briefing was submitted, prior to the Court issuing its *Findings of Fact, Conclusions of*

Law and Order, awarding Plaintiff the relief sought. Attorney fees were requested, but denied pursuant to the procedure allowed by the Idaho Rules of Civil Procedure. Timely Notice of Appeal followed. (R. Vol. I, pp. 24 & 400-410)

Statement of Facts

This Statement of facts is based upon the District's Court's Summary of Testimony and Exhibits, and Findings of Fact, included in its Order. (R. Vol. II, pp. 370-396) Appellant does assert the District Court's findings were clearly erroneous, but only in relation to whether the legal conclusions are sustained by the facts found. Appellant takes no issue with the court's findings of fact, except where specifically called out herein, with more specific references to the Clerk's Record and Transcript on Appeal.

Summary of Testimony and Exhibits

Donald Steuerer is the plaintiff herein. According to his testimony, he is a 67 year old resident of the City of Shoshone, Idaho since 1990. Steuerer resides at 110 North Greenwood, the subject property. Plaintiff purchased the subject property from the Old Fellas on a "hand shake" in December 1987 for the sum of $3,000.00, which was paid in installments over a period of approximately seven (7) months. At the time of purchase the plaintiff was a resident of the State of New York. Plaintiff, for a period of time, worked on Wall Street as a trader. He has not worked since 1996 and last filed tax returns in 1996. In 2003 he began receiving SSI disability benefits. He received those benefits until the year 2007 when he began receiving Social Security Benefits of approximately $800.00 per month. He has had no other source of income.

The plaintiff became acquainted with the defendant, N.E.M. Richards, in 1990. She was residing at 115 North Greenwood in the City of Shoshone. Her residence is

across the street from the subject property. Between 1990 and 1997 they would visit a few times per week. He considered her a friend. In the summer of 1997 he had a conversation with Ms. Richards at her residence as to what he intended to do with the subject property and he indicated he intended to develop the property into a bar/restaurant. She inquired as to how much he would need to accomplish his plan and he indicated he would need $2,000.00 to $5,000.00. He denied at the time of this discussion there was any mention of delinquent property taxes. He testified Ms. Richards offered to loan him $5,000.00 for development of a bar/restaurant. He offered to put her name on his deed if she loaned him the money and he intended the deed as collateral for her loan. However, Steuerer testified at the time of signing the deed he believed Richards owned ½ of the property. (Tr. Vol. I, p. 64) He did testify he had offered to make her a partner in the bar/restaurant but she declined. There was no discussion between the parties as to the date or time for repayment, except that he would pay it back when the "bar got opened." As for the loan, he denies he ever received the sum of $5,000.00 and testified he only received the sum of $2,000.00, in the form of four (4) consecutive checks of $500.00. He executed a Warranty Deed [Exhibit 101] as the collateral for the loan and placed Ms. Richards' name on the deed on February 25, 1997. He testified Ms. Richards told him that she did not have any other money to loan him.

After he received the $2,000.00 from Ms. Richards he did not have much contact with her between 1997 and 2000 because she was in and out of the hospital. He testified that he only saw her a few times a month. Sometime in the year 2000, Ms. Richards came to his residence and they discussed his delinquent property taxes. She offered to catch him up on the property taxes for three years if he would deed all of the subject

property to her as collateral. Concerning this loan, regarding the property taxes, she said "pay me back when you can." Regarding these loans there was never any discussion about interest to be paid on the loans. He executed a Quit claim Deed [Exhibit 102] to Ms. Richards on May 8, 2000.

After the year 2000, he did not see Ms. Richards again until either 2003 or 2004 when he was at the VA Hospital in Boise for medical treatment. Ms. Richards was also at the hospital for medical care. He testified he told Ms. Richards he was receiving SSI benefits and could start repaying the loan and she responded he should call her to discuss repayment. He testified he attempted to call her and write to her but his mail was returned undeliverable and his calls were not returned. When he would call the phone was either busy, she did not answer, or the voice mail was full. It was not until March 2007 that he was able to speak with Ms. Richards concerning the repayment of the loan. This was after Valley Co-op expressed an interest to him in purchasing the subject property. He drove out to a ranch where she was staying and met her near some corrals. He told her he might have an opportunity to sell the subject property and wanted to know what he owed her on the loan. He offered to pay her interest on what he owed but she said, "just pay me what you owe me." He admits that after the year 2000 Ms. Richards paid all the property taxes, except for the June 2011 taxes, which he paid. Sometime in May 2007 he and Ms. Richards had dinner in Twin Falls and he wanted to talk about repayment of the loan. He testified Ms. Richards was "in too much of a hurry" to talk about it. About three weeks later he says he tried to call her and discovered she was in the hospital. He says he followed up with letters but they were again returned undeliverable.

He did not have any opinion as to the value of his property in 1997, other than he assumed it was worth more than what he had paid for it. He testified that Valley-Co-op has offered him $110,000.00 for the subject property.

On cross examination, he was confronted with a prior affidavit, wherein he testified that in 1997 he was destitute. He admitted he does not know what that term means. Today the roof of the building on the subject property is not sound and the interior of the building is open to the elements. The exterior of the building has not been painted since he has owned it. He did not pay the property taxes on the subject property for the period of 1995 to 1997. He does recall the months in 1997 that he received the four (4) consecutive check of $500.00. He only had a checking account at First Security Bank, at the time. He no longer has any bank records for the relevant period of time in question. He denies he ever told Ms. Richards he was delinquent on his property taxes in 1997. However, in his affidavit on file with the court, he asserted under oath he was destitute and "that he needed money to pay real property taxes and other personal expenses." He did not state the loan was for a bar/restaurant. His affidavit also states Ms. Richards agreed to loan him "$2,000.00" not the $5,000.00 referred to on his direct examination. He admits he did not use any of the $2,000.00 to pay his property taxes, although he claims to have used the money to "fix up" the building. He admits at no time has he ever attempted to pay back the loan by sending payments to Ms. Richards, write a check, or actually tender any funds. (Tr. Vol. I, pp. 77-84) His explanation is he did not know where to send a payment, since her mail was undeliverable. The Shoshone Club was the name of his intended bar/restaurant. The plaintiff is also known as "Brooklyn Don."

Donn Bordewyk is the General Manager of the Valley Co-op, which is a farm supply cooperative. He reports to the Board of Directors of the Co-op and oversees day-to-day operations, as well as the long-term objectives of the Co-op. He has been the general manager since 1996. He is familiar with the subject property which consists of two city lots in Shoshone. The Co-op owns a C-Store and a gas station that are adjacent to the subject property. The Co-op's property was refurbished in 1998 at a cost of $1.9 million. Since the remodel, the Co-op has acquired other property adjacent to its property; one consisting of three city lots, purchased in 2006 for $140,000.00, and the other consisting of four city lots, purchased in 2007 for $180,000.00. The Co-op is also interested in purchasing the subject property and approached Mr. Steuerer in 2007. At that time, the Co-op thought he was the titled owner of the subject property. He first met with Mr. Steuerer in his office in Jerome. At some point in early 2010, after this meeting and after he became aware of the quitclaim deed to Ms. Richards [Exhibit 102], he contacted plaintiff's counsel to begin the process of purchasing the subject property. He had a conversation with Mr. Steuerer as to why his name was not on the title to the subject property. Mr. Steuerer told him he had borrowed money from Ms. Richards for expenses related to opening a business. He testified he had attempted to contact Ms. Richards sometime in 2008 or 2009 by telephone, but he was not able to reach her; on each occasion her voice mail was full and he could not leave a message. [The record actually reveals that Bordewyk testified he was able to leave messages and on occasion the voice mail was full. (Tr. Vol. I, p. 98)] He does recall talking to her on the telephone in April 2012. Ms. Richards' told him that she would get back to him about the transaction. When he did not hear back from her he tried to call her several more times.

It was not until December 2010 he had any substantial conversation with her. He testified Ms. Richards told him the amounts Steuerer owed were a loan for a business and they talked about the amount owed. This was the first time he had heard there was an additional $5,000.00 owed. They also discussed a fair interest rate. On cross-examination, Mr. Bordewyck admitted Attorney Williams works for him. (Tr. Vol. I, p. 101)

N.E.M. Richards is a resident of the City of Shoshone, Idaho and has resided, for over 20 years, at 115 North Greenwood, located across the street from the subject property. She currently suffers from various physical and mental disabilities and has been treated for such disabilities at the VA Hospital since approximately 1998. These disabilities have an impact on her ability to recall and organize her thoughts. She grew up in Hansford, Washington and went to school in the State of Washington. She went to nursing school at the University of Washington, but her education was interrupted by service in the military during the Vietnam War. After the war she returned to school at Washington State University and obtained a doctorate degree in veterinary medicine. She has never been licensed in any State to practice veterinary medicine, but has worked in a number of veterinary clinics, including the Shoshone Veterinary Clinic. She moved to Shoshone in 1987. She purchased her current residence in 1990 and it was at this time she first met Mr. Steuerer. They would visit from time to time and she, on occasion, would feed him; allow him to borrow water; and allow him to shower at her residence.

In approximately 1995 or 1996, Mr. Steuerer approached her and told her he was behind on his property taxes. She thought his house was close to foreclosure based on his delinquent taxes. She gave him $2,000.00, which she thought he was going to use to pay

his back taxes. She did not want to see him living on the streets. She does not recall if she gave him the money in cash or by way of a check. She testified there was a verbal agreement he would pay her back "as soon as possible." "I didn't think it would be right away. I thought that it would take him sometime, because I thought he should do the taxes. I told him don't worry about it." By February 1997, Mr. Steuerer had not paid back the money. She had not made any demand for payment, because "I don't believe in pressing people for money." In February 1997, she talked to someone else who had lent money to Mr. Steuerer and Mr. Steuerer had given this person some guns as "collateral." At this time she thought Mr. Steuerer's property was worth about $6,000.00, so she asked him for half of his property as an "incentive to pay me back." She asked him for a document saying half of his property was hers and he gave her the Warranty Deed [Exhibit 101]. She believed she was a half owner of the subject property after receipt of the Warranty Deed. (Tr. Vol. I, pp. 113-14)

She does not recall if, between 1997 and 2000, she and Mr. Steuerer had any conversations about repayment of the $2,000.00 loan. She does recall going to dinner with Mr. Steuerer in Twin Falls. She testified she was hoping to talk about repayment but it was Mr. Steuerer who did not want to discuss the subject. She admits this dinner was sometime after the year 2000. She did testify that sometime in 1997 Mr. Steuerer approached her and indicated he was in need of more money because he was still behind on his property taxes. She agreed to give him $5,000.00, over time, in increments. She told him "if he signed over the whole thing [referring to the subject property] ... I would catch up on everything and pay taxes [referring to the property taxes]." She claims to have given him a series of checks totaling $5,000.00 over a ten month period. At the

time of trial, she belatedly, provided Exhibits 212 [original check stubs including check #1807 dated 2/25/1997 payable to Donald E.K. Steuerer/Shoshone Club for $400.00; check #1809 dated 3/3/1997 payable to Steuerer for $100.00; check #1812 dated 5/1/1997 payable to Steuerer for $500.00], 213 [original Washington Mutual check register listing check #425 dated 6/1/1997 payable to Steuerer in the amount of $500.00], 214 [Washington Mutual cancelled check to Don Steuerer #415 for $500.00 dated 6/1/1997 and check #511 dated 7/1/1997 payable to Shoshone Club in the amount of $500.00]. 215 [original partial check register].

The deposition of Ms. Richards was taken on March 14, 2011 and admitted into evidence at trial. As to the money she paid Mr. Steuerer, she testified, in relevant part, as follows:

[Pg. 13, L. 5-12]

Q: ....When was the first time you agreed to loan money to Mr. Steuerer?

A: In the late 1990's.

Q: And what was the reason that you agreed to loan him money?

A: I didn't want him to be on the streets. And he was delinquent in his taxes, so that I could keep the house – he could keep the house from foreclosure.

[Pg., L. 5-12]

Q: So did you make a loan to him the late 1990's?

A: Yes.

Q: And how much was it for?

A: 2,000.

Q: How did you pay him the money that was loaned to him?

A: I don't remember.

[Pg. 16, L. 15-21]

Q: And what do you say the agreement that you made together, you and Mr. Steuerer, as to how you would be repaid the loan?

A; He – I – he indicated he would pay me back as soon as possible. And I told him not to worry; I would not charge him rent, just to imagine it was his. So there was no definite time period to pay back.

[Pg. 17, Line 2-8]

Q: Did you agree on a time by which the loan had to be repaid?

A: As soon as possible.

Q: After you made Mr. Steuerer this $2,000.00 loan, did you ever ask him for the money to be paid back to you?

A: No.

[Pg. 25, L. 1-9]

Q: So he deeded you a half interest in the property for the $2,000.00?

A: Correct.

Q: And did you consider yourself the owner of the property at that time?

A: No.

Q: So what was the arrangement, why didn't you –

A: Part Owner.

[Pg. 25, L.17 to Pg. 26, L.12]

Q: Why didn't you take possession of it if you had a half-ownership interest in it?

A: Because I made an agreement with Brooklyn Don that he could just live there and pay me back.

Q: So without trying to put words in your mouth, Ms. Richards, this is more like a mortgage then, you had basically an interest in the property, and when he paid you back, you would deed your interest in the property back to him, was that the intent?

A: The intent was to have some kind of collateral.

Q: So you viewed your half interest in the property that was acquired by this deed as collateral? Was there some other kind of collateral, other than this deed?

A: No.

Q: So let's just say, what would you have done then, let's say in the year 1998, had he paid you back the $2,000.00?

A: I would have signed it back over to him, as I told him I would.

[Pg. 26, L.23 to Pg. 29, L.8]

Q: Between 1997 and the date of the Deposition Exhibit No. 2, at least the last page of the Deposition Exhibit No. 2, which the document says is May 3rd, 2000, -- maybe May 8th, 2000, it appears. Did you make any more loans to Mr. Steuerer over and above the $2,000.00 you've already told me about?

A: Yes.

Q: How much did you loan him and when did you loan it to him?

A: 5,000. And I'm not sure when. It was not all at one time.

Q: Do you remember when any part of the $5,000.00 was loaned to Mr. Steuerer?

A: Not at this time. Late 1990's.

Q: Was it before the date that's on the that deed that we're looking at, the last page of Exhibit 3?

A: Yes.

Q: It would have been before May 8th, 2000?

A: Yes.

Q: And why did you loan the additional money to him?

A: I don't remember what reason he gave me.

Q: But, in any event, your testimony is that you did advance him an extra $5,000 sometime between February of 1997 and May of 1998?

A: Yes.

Q: Was there any new agreement reached between the two of you at time as to how the new loan amount, which appears to now be up to about $7,000, would be paid?

A: No.

Q: Was it –

A: Not except for as soon as possible.

Q: Still as soon as possible?

A: Correct.

Q: And there still was no specific date mentioned?

A: No.

Q: After May 8, 1998, if Mr. Steuerer would have paid you back the $7,000, what would you have done?

A: Signed it back over to him.

Q: Now, could you tell me, looking at the last page of Deposition Exhibit No. 3, again, which is the Quitclaim Deed dated May 8, 2000, why was this second deed signed and give to you at the time?

A: Because of the loan. The extra loan.

Q: The new –

A: That's why – I'm sure he –

Q: The new $5,000 loan?

A: Correct.

Q: Was it supposed to be again, collateral, like the warranty deed was to be collateral from the initial $2,000 loan?

A: It was something to assure me that he was going to pay me back.

Q: After May 8, 2000, did you ever take possession of the real property that's described in the quitclaim deed and the warranty deed?

A. No. It was the same agreement, live there free.

Q: Has that agreement –

A: Consider it your own.

District Court Findings of Fact

Steuerer purchased the subject property in December of 1987 for the sum of $3,000.00. The subject property has a two story structure on it and the property consists of two city lost. Richards lives at 115 North Greenwood which is across the street from the subject property. Steuerer became a fulltime resident of the City of Shoshone in 1990. Richards purchased her current residence in 1990. In 1990 Richards and Steuerer became acquainted as friends.

Steuerer was capable of paying his property taxes on the subject property from the time he purchased it up until approximately 1995. The evidence is unclear as to Steuerer's income for those years. Steuerer has not filed any income tax returns since 1996. Between 1995 and 1996 his gross income was not more than $8,000.00 from part-time work. From 1995 forward, Steuerer did not pay his property taxes.

Richards, from time to time, would help Steuerer by feeding him, providing him with water, and allowing him to shower at her residence. At some point in time, Richards and Steuerer had discussions regarding the subject property. The testimony of the parties is in conflict as to when these discussions took place and as to the content of those discussions. According to Richards, these discussions first took place sometime between 1995 and 1996. According to Steuerer, these discussions first took place in 1997. As to the content of the discussion, according to Richards, they concerned Steuerer's delinquent property taxes and according to Steuerer the discussions concerned his desire to develop his property into a bar/restaurant, to be known as the Shoshone Club. Richards denies any discussion of the idea of a bar/restaurant Steuerer denies any discussion of delinquent property taxes. What is not in dispute is these discussions concerned Steuerer's need for money and Richard's willingness to assist Steuerer financially. It was clear to the court the current recollection of the parties, in their testimony, are not necessarily reliable 15 years later. This case is a classic example of why friends and handshakes do not always work.

There is no dispute that, at some point in time, Richards agreed to loan money to Steuerer and did in fact loan money to Steuerer. There is a conflict in the testimony of the parties as to when the money was loaned and how much money was loaned.

According to Richards, in 1995 or 1996 she initially paid Steuerer the sum of $2,000.00; however, she does not know if the money was paid in cash or by check. Further, Richards testified she loaned an additional $5,000.00 to Steuerer sometime in 1997, which was paid in monthly payments over a period of ten (10) months. According to the testimony of Steuerer, he only received the sum of $2,000.00 in 1997, which was paid to him in the form of four (4) checks, each in the sum of $500.00 over four (4) consecutive months. From the notations on the original check stubs [Exhibit 212], it would appear Richards originally agreed to loan $5,000.00 in February 1997.

The Court found no reliable evidence, either through the testimony of the parties or the documentary evidence, that Richards loaned any money to Steuerer in 1995 or 1996. Plaintiff asserts the testimony of Richards on this point is un-contradicted, and her demeanor credible, while Steuerer was discredited on a host of statements. The documentary evidence [Exhibits #212-215] absolutely verifies Richards issued six (6) monthly consecutive checks totaling $2,500.00 to Steuerer. The documentary evidence on this topic proves Steuerer's testimony that he only received four (4) monthly, consecutive checks for $2,000.00 is inaccurate. The evidence verifies that Steuerer was paid, at least $2,500.00, as follows:

Check #	Date Paid	Amount Paid
1807	2/25/1997	$400.00
1809	3/03/1997	$100.00
495	4/01/1997	$500.00
1812	5/01/1997	$500.00
425	6/01/1997	$500.00

511 7/01/1997 $500.00

The documentary evidence [Exhibit 212] also supports the finding that Richards agreed to loan to Steuerer the sum of $5,000.00 in February 1997; by reason of the notations she made on her check stubs #1807, 1809 and 1812. On each of these check stubs there is a notation written by Richards at the time the check was issued. The notation for check #1807 is "$5,000-Balalnce 4600"; the notation for check #1809 is "Balance for March 1st $4500"; and the notation for check #1812 is "May Balance $3,500." This is consistent when one considers the April 1, 1997 check, issued to Steuerer for $500.00, check #495, which was written from a different account. It is clear that, for a period of time, Richard was tracking how much of the original $5,000.00 had been paid to Steuerer. The court examined Exhibit 213, the original check register of Richards, which appears to cover the period of 4/9/96 to 10/28/98, and concluded during this entire period there were only two checks written from this account; check #495, dated 4/1/97 for $500 payable to Steuerer, and check #511, dated July 1, 1997, for $500, written to the Shoshone Club. The court also found the first check Richards wrote [check #1807] made reference to both Steuerer and the Shoshone Club.

It appeared to the Court from the testimony of Richards and Steuerer that their recollections of the events are not necessarily reliable, as to the amounts loaned and when. The court found the testimony that Richards loaned $2,000 to Steuerer in 1995 or 1996 is not reliable and that the testimony of Steuerer that he only received four (4) consecutive checks of $500.00 each is not reliable. In February 1997 Richards agreed to loan $5,000.00 to Steuerer to be paid to Steuerer in monthly payments. Based on the documentary evidence, and disregarding the testimony of Richards, the amount paid by

Richards to Steuerer over six (6) months totaled $2,500.00. Richards was only able to find records that support the six (6) payments to Steuerer, but has not retained or provided to the court documentary evidence of any other payments to Steuerer. The Court found the testimony of Steuerer and Richards as to the number of payments made is not reliable and the best evidence is the documentary evidence that has been admitted. The court found of the agreed $5,000.00, Richards paid $2,500.00 to Steuerer.

The first payment by Richards to Steuerer, verified by documentary evidence was on February 25, 1997. A Warranty Deed dated February 24, 1997, was prepared, whereby Steuerer conveyed to Richards a one-half interest in the subject property. The deed was notarized and recorded on February 26, 1997. The deed was signed by both Steuerer and Richards. Steuerer testified that the purpose of the deed was to be collateral for the $5,000 loan from Richards. Richards testified in her deposition the purpose of the deed "was to have some type of collateral." Ms. Richards believed herself to be part owner as a result of the deed and having paid Steuerer $2,000. (R. Vol. II, pp. 378-379)

Both parties were of the expectation and agreement the amounts paid to Steuerer by Richards would be repaid by Steuerer and, upon repayment, Richards would re-convey her interest in the subject property to Steuerer. The parties did not agree as to a definite time for repayment, other than to agree Steuerer would repay the monies as soon as possible, or when he could. Richards, prior to the filing of the lawsuit, has never made demand for repayment. There was no agreement as to any interest to be paid and it was not a topic of discussion in the original agreement.

Prior to June 20, 2011, the last time Steuerer personally paid any real property taxes on the subject property was on April 2, 1997, in the amount of $201.58 [Exhibit

107]. This was for the 1994 property taxes, which were delinquent and the payment was inclusive of the tax, interest, and penalties owed to Lincoln County. In May 2000, Steuerer was delinquent in the payment of his property taxes on the subject property for the prior years of 1995 to 1999. Richards brought the property taxes current by her payments to Lincoln County dated May 8, 2000 and December 20, 2000. [Exhibits 108-112].

On May 8, 2000, the same day Richards paid part of the delinquent property taxes on the subject property, Steuerer executed a Quitclaim Deed to the subject property, wherein he conveyed his remaining interest in the subject property to Richards. The deed was notarized and recorded on May 8, 2000. As with the Warranty Deed, the Quitclaim Deed was signed by both Steuerer and Richards. The testimony of Steuerer and Richards is again in conflict as to the reason for the quitclaim deed; however, what is clear is that it was executed contemporaneously with Richards' agreement to pay the property taxes on the subject property. Richards testified the purpose of the quitclaim deed was the same as the warranty deed, as collateral or "something to assure me that he was going to pay me back." As a result of the second deed Ms. Richards believed she owned the subject property. (Tr. Vol. I, pp. 131-136) Richards had agreed to, and would have, re-conveyed the subject property to Steuerer if repaid. (Tr. Vol. I, pp. 131-135; R. Vol. II, pp. 380-381)

Between May 8, 2000 and December 20, 2000, Richards paid all of the property taxes, including any interest and penalties, in the sum of $6,784.91.

At all times relevant, between 1997 and 2010, Steuerer continued to occupy the subject property and was not paying any rent to Richards; nor had Richards demanded the

payment of rent. Mr. Steuerer never tendered up any money to Ms. Richards. (Tr. vol. I, p. 141)

ARGUMENT

I.

JURISDICTION

The threshold question, as in any appeal, is whether this Court has jurisdiction of the parties and subject matter. Idaho Appellate Rule 11(a)(1) provides the basis for jurisdiction of this Court. The Rule follows the Idaho Constitution, Article 5, Section 9, which states in part, "[t]he Supreme Court shall have jurisdiction to review, upon appeal, any decision of the district courts, or the judges thereof." In that the District Court, Honorable Judge John K. Butler presiding, on September 6, 2011, and September 8, 2011, respectively, entered Findings of Fact, Conclusions of Law and Order, and Judgment thereon, the Supreme Court clearly has jurisdiction. Notice of Appeal, file stamped by the Clerk of the District Court on October 12, 2011, was timely filed within forty two (42) days of the final order of the District Court, thus perfecting the jurisdiction of the Supreme Court of the State of Idaho.

II.

STANDARD OF REVIEW

There can be no question, that where one asserts that a deed shall be given a different construction from that clearly appearing on its face, the burden is upon him to show by clear and convincing evidence that a mortgage, and not a sale with a right to repurchase, was intended. Credit Bureau of Preson v. Sleight, 92 Idaho 210, 216, 440 P.2d 145, 149 (1968) Equally certain, is that the determination of what is clear and

convincing evidence is primarily for the trial court, and is not generally open to review in the appellate court. Id. [see also Gem-Valley Ranches, Inc. v. Small, 90 Idaho 354, 363, 411 P.2d 943, 948 (1966)] A trial Court's findings of fact will not be set aside on appeal unless they are clearly erroneous. Idaho R. Civ. P. 52(a); Hogg v. Wolske, 142 Idaho 549, 553, 130 P.3d 1087 (Idaho 2006)

Recent decisions of this Court make it plain that a heightened burden of proof at trial does not alter the usual standard of appellate review. When a trial court finds facts that must be established by clear and convincing evidence, the question on appeal remains whether the findings are supported by substantial and competent evidence. Kreiensieck v. Cook, 701 P.2d 277, 280, 108 Idaho 657 (Idaho App. 1985)

However, this Court exercises free review over the lower court's conclusions of law to determine whether the court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found. Electrical Wholesale Supply Co., Inc. v. Nielson, 41 P.3d 242, 136 Idaho 814 (Idaho 2001). Likewise, this Court has free review to determine the applicability of a presumption as a question of law. In re SRBA Case No. 39576, 128 Idaho 246, 256, 912 P.2d 614, 624 (1995).

In the case before this Court the District Court may have properly recognized the correct burden to be overcome by Plaintiff, but it failed to recognize all the legal presumptions and applicable substantive criteria in reaching its decision. Therefore, Appellant does not argue the findings of fact are clearly erroneous, but instead argues the District Court's conclusions of law are not sustained by the facts found.

III.

DISTRICT COURT FAILED TO RECOGNIZE PROPER PRESUMPTIONS AND APPLY COMPLETE SUBSTANTIVE LEGAL STANDARDS

Fee-simple Conveyance Presumption

The District Court did not recognize, or ignored the presumption that a fee-simple title is presumed to pass by a grant of real property, and, independent of proof, the presumption arises that the instrument is what it purports on its face to be, an absolute conveyance of land. Gray v. Fraser, 123 P.2d 711, 63 Idaho 552 (Idaho 1942). The Court in Gray clearly annunciated the presumption that a fee-simple title is presumed to pass by a deed of conveyance of real property. To justify a trial court in determining that a deed which purports to convey land absolutely in fee simple was intended to be something different, as a mortgage, the authorities are uniform to the point that the evidence must be clear, satisfactory and convincing, and that it must appear to the court beyond reasonable controversy that it was the intention of the parties that the deed should be a mortgage. Gray, at 559, citing Beckman v. Waters, 161 Cal. 581, 119 P. 922, quoting (incompletely) from Couts v. Winston, 153 Cal. 686, 96 P. 357.

The District Court did not recognize I.C. 55-606 the legislature's declaration of the conclusiveness of conveyances of land. The law presumes the holder of title to property is the owner thereof. Erb v. Kohnke, 121 Idaho 328 at 331, 824 P.2d 903 (Idaho App. 1992); Hawe v. Hawe, 89 Idaho 367, 406 P.2d 106 (1965); Shurrum v. Watts, 80 Idaho 44, 324 P.2d 380 (1958). The District Court simply ignored this critical presumption in leaping to its conclusion.

This presumption is built into the most basic statement of law in this field, "It is well-settled rule of law that where one asserts that a deed shall be given a different

construction from that clearly appearing on its face, claiming that it is a mortgage, he must show be clear and convincing evidence that a mortgage, **and not a sale with the right to repurchase was intended.**" Hogg, at 1091-92 (emphasis added). Yet the District Court did not once in its Order even reference the presumption. How can it be said that, beyond a reasonable controversy, a mortgage was intended, when neither party seemed even to know what the term "mortgage" means?

Conveyance / Agreement to Re-Convey Upon Payment

The District Court did not apply the correct and complete substantive law to the facts of this case. The District Court quoted from the 1937 opinion in Jaussaud v. Samuels, 58 Idaho 191, 71 P.2d 426, 431, stating, "It is well settled law of this state that a deed, absolute in form, the terms of which are not ambiguous may constitute a mortgage." While the preceding is undoubtedly true, the District Court omitted from its recitation of the substantive law included the Jaussaud Court's next declaration. "It is also settled law that a mortgagor subsequent to executing the mortgage may sell his equity of redemption to the mortgagee; that is, a mortgagee may legally take a deed transferring the mortgaged property in satisfaction of the debt and legally give an option to purchase back." id at 202, quoting Shaner v. Rathdrum State Bank, 29 Idaho 576, 161 P. 90. This rule was recently reitereated in Hogg v. Wolske, 142 Idaho 549, 130 P.3d 1087 (Idaho 2006), where the Court restated the old rule announced in Parks v. Mulledy, 49 Idaho 546, 551, 290 P. 205, 207 (1930), that a person may purchase lands, and at the same time contract to re-convey them for a certain sum, without the intention of either party that the transaction should in effect be a mortgage.

Thus, the District Court clearly did not recognize and consider the competing principle of substantive law, in fact the legally presumed state of affairs, in its analysis. Superior to the principle of law the District Court did recognize, that deeds may be recognized as mortgages upon the proper showing, is the presumption "...that a party can make a purchase of lands, either in satisfaction of a precedent debt or for a consideration then paid, and may at the same time contract to reconvey the land upon the payment of a certain sum, without any intention on the part of either party that the transaction should be in effect a mortgage." Clontz v. Fortner, 88 Idaho 355, 399 P.2d 949 (Idaho 1965)

Dickens Criteria / Modern Controlling Test

The District Court correctly cited Dickens v. Heston, 53 Idaho 91, 21 P.2d 905, 90 A.L.R. 944 (1933), as the historically leading case on the subject at issue. The Dickens case continues to be relied upon as supplying the general criteria to be applied in determining whether a deed, absolute upon its face, is in fact a mortgage; namely, (a) existence of debt to be secured; (b) satisfaction or survival of the debt; (c) previous negotiations of parties; (d) inadequacy of price; (e) financial condition of grantor; and (f) intention of parties.

Survival of Debt

However, the District Court failed to state that under current law, the controlling test to be applied is whether the grantor sustains the relation of the debtor to the grantee after the execution of the instrument. Credit Bureau of Preson v. Sleight, 92 Idaho 210, 216, 440 P.2d 145, 149 (1968). The Court in Sleight stated, "While all these factors are to be considered, the controlling test to be applied is whether the grantor sustains the relation of debtor to the grantee after the execution of the instrument, Clinton v Utah

Constr. Co., 40 Idaho 659, 237 P. 427 (1925). A mortgage is an incident of the debt, and without a debt there can be no mortgage. Hawe v. Hawe, 89 Idaho 367, 406 P.2d 106 (1965); Shaner v. Rathdrum State Bank, 29 Idaho 576, 161 P. 90 (1916)." Sleight at 216.

Whether a debt was to be secured is at best unclear on the facts before the court, certainly if a debt it was, it has not been repaid. No exact amount, nor date of repayment, was established by clear agreement of the parties. According to Ms. Richards she agreed to give Steuerer, first two thousand dollars ($2,000) and later five thousand dollars ($5,000), if she were paid back as soon as possible. Ms. Richards testified Steuerer failed to make any effort at repayment and therefore accepted first a one half (1/2) interest in the property by Warranty Deed, and when the second sum of money had not been repaid, she accepted a Quitclaim Deed transferring full ownership to her. While she did testify she would have re-conveyed the property upon repayment, repayment never came.

The obvious factual difficulty with the case is lack of written agreement, and of course it is this difficulty that gives rise to the Statute of Frauds. (I.C. Section 9-503) If a debt in fact survived, how would Richards have executed upon the debt? By foreclosure? By suit on oral contract? Before a deed can be declared to be an equitable mortgage there must exist a debt which must be personal in its nature and enforceable against the person independent of the security. Shaner v. Ratgdrum State Bank, 29 Idaho 576, 161 P. 90 (Idaho 1916) Idaho Code Section 5-217 requires an action on an oral contract to be brought within four (4) years. If such an action is not brought within the required period of time, it is forever barred. Therefore, a complete defense exists as to any action brought for the debt, and Plaintiff cannot satisfy this criteria; the controlling test under the law.

Concurrent Intention of Parties to Create Mortgage

The District Court stated, on page 21 of its order, "Where an instrument in writing in the form of a deed of conveyance is executed and delivered as security for a debt, such instrument becomes a mortgage, and not a deed, notwithstanding the form of the instrument," quoting Bergen v. Johnson, 21 Idaho 619, 123 P. 484, 484 (1912) This "rule" is quoted from the Bergen Court syllabus, not the opinion proper, and is an incomplete statement of law, even from 1912. The state of the law then as now required a finding that the concurrent intention of both parties at the time of the transaction, was to create a mortgage. Bergen at 626.

The District Court appears to have applied the overruled proposition of law that when at the time of execution of an absolute conveyance, a separate agreement to re-convey is also entered into the transaction will constitute a mortgage. The Court stated, "The fact that the grantee retains in his possession without cancellation the written evidence of a debt raises a strong presumption that the conveyance given did not extinguish the debt, and that a mortgage was intended." (R. Vol. II, p. 390) This is a curious statement, in that no written agreement, but an oral agreement to re-convey, was entered, nevertheless, it is the Court's utterance. This rule of law has been explicitly overruled. Clontz v. Fortner, 88 Idaho 355, at 362, 399 P.2d 949 (Idaho 1965)

> The rule above stated is too narrow....It fails to incorporate other necessary and controlling elements, and eliminates the question of intention of the parties, and encroaches upon their right to contract. In effect, literally speaking, this portion of the opinion holds that a deed, in form an absolute conveyance, expressing the intention of the parties, coupled with possession, payment of taxes, assertion of ownership, and with a positive understanding by the grantee that he had an absolute conveyance and his positive refusal to accept anything but an absolute conveyance, cannot be upheld as such, if at the time of the execution of

> the deed an agreement was entered into to reconvey the property. Such a holding is contrary to the great weight of authority, and not in harmony with prior and recent decisions of this court.

Whether a deed, absolute on its face is to be deemed a mortgage depends upon the intention of the parties in regard to it at the time of its execution. "In order to convert a deed absolute in its terms into a mortgage, **it is necessary that the understanding and intention of both parties grantee as well as grantor, to that effect should be concurrent and the same**." Clontz, 88 Idaho 355 at 362, 399 P.2d 949 at 952. (emphasis added)

The District Court failed to even acknowledge the requirement that "intention of the parties" referenced in Dickens criteria be a **mutual intention, not the unilateral intention of just one party**. Hogg v. Wolske, 142 Idaho 549, 130 P.3d 1087 (Idaho 2006) The District Court is required to consider the understanding and intention of **both parties to the transaction, grantees as well as grantors.** Bergen v. Johnson, 21 Idaho 619, 626, 123 P. 484, 487 (1912) (emphasis added).

Here, both parties, in fact recognized this transaction for what it was, a grant of ownership, with an agreement to re-convey. The parties indeed used alternating, contradictory terms, collateral versus transfer of ownership or "turned over", but never both simultaneously, at the time of the transaction, "mortgage." Certainly, this is not a concurrent, mutual, agreement the transaction was intended to be a mortgage.

IV.

COURT DECLARED EQUITABLE MORTGAGE WITHOUT ANY CONSIDERATION OF EQUITABLE PRINCIPALS OF LACHES AND ESTOPPEL

Plaintiff, Steuerer, came to the Idaho judiciary seeking to have the courts declare the transaction of the parties an equitable mortgage. "In attempting to have a deed declared a mortgage, equity requires the party so asking to tender and offer to pay the amount of the debt and interest before he is entitled to any standing in a court of equity. Shaner v. Ratgdrum State Bank, 29 Idaho 576, 161 P. 90 (Idaho 1916) citing (*Hicks v. Hicks* (Tex. Civ.), 26 S.W. 227; *Dawson v. Overmyer,* 141 Ind. 438, 40 N.E. 1065; *Rodriguez v. Haynes,* 76 Tex. 225, 13 S.W. 296; Jones on Mortgages, 2d ed., par. 1095.)

When seeking equity one must approach the court with clean hands deserving equity. This principle, and estoppel by laches, were explored by the Court in Clontz v. Fortner at 363. Here, like in Clontz, no evidence exists that plaintiff even spoke to defendant about the transaction for years and years. Like in Clontz, the defendant expressed public displays of ownership of the property, (payment of taxes) while plaintiff sat silent. The Clontz court found the Plaintiff to be estopped from claiming the deed, absolute on its face, to be a mere mortgage. The Court, at page 364 cited a California case, Hamud v. Hawthorne, 52 Cal.2d 78, 338 P.2d 387 (1959), at some length, quoted below,

> It was not until plaintiffs learned of the interest of an oil company in the subject property that they bestirred themselves to ascertain whether such property was worth an effort on their part to reclaim it. As commented in *Livermore v. Beal (*1937), 18 Cal.App.2d 535, 549, 64 P.2d 987, 'one is not permitted to stand by while another develops property in which he claims an interest, and then if the property proves valuable, assert a claim thereto, and if it does not prove valuable, be willing [399 P.2d 954] that the losses incurred * * * be borne by the opposite party. This thought was expressed

in one case by the following language: 'If the property proves good, I want it; if it is valueless, you keep it." (See also *Robison v. Hanley (*1955), 136 Cal.App.2d 820, 824-825[1-2], 289 P.2d 560.' 338 P.2d at 392.

The following statement from 59 C.J.S. Mortgages § 59, p. 105, is applicable here:

'A party who has the right to treat a deed absolute on its face as a mortgage and to redeem from it must be reasonably prompt in asserting such right; very long delay, amounting to laches on his part, may defeat his right to have the deed declared to be a mortgage and his right of redemption, especially if interests of third persons have intervened, or if the grantee has been allowed to deal with the property in such manner that a redemption would seriously prejudice him, and one conclusively chargeable with full knowledge of his rights will not be permitted to excuse his delay in seeking relief on the ground of ignorance of his rights.'

And the following from 31 C.J.S. Estoppel § 107, pp. 547-548:

'The term 'quasi estoppel' has been applied to certain legal bars which are in some respects analogous to estoppel in pais and which have the same practical operation as an estoppel in pais, but which nevertheless differ from that form of estoppel in essential particulars. Thus, it has been held that no concealment or misrepresentation of existing facts on the one side, no ignorance or reliance on the other, is a necessary ingredient.

'The doctrine classified as quasi estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits; and the principle precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit.'

Here, Steuerer was perfectly content to allow Ms. Richards to believe she owned the property for some thirteen years. Steuerer sat idle while a disabled woman paid real property taxes on the home she believed she owned, while not charging rent, due to pity. Steuerer was perfectly content to be pitied as man who couldn't pay rent, while allowing the property to deteriorate. Mr. Steuerer took not one step to assert ownership, nor obligation, with regard to the property in question until he learned that it was not a no rent

hovel, but a developable parcel of commercial land. Under these circumstances this Court, like the Clontz and Hamud Courts, must send away the opportunist. Mr. Steuerer's claim is barred by laches and equitable estoppel.

V.

ATTORNEY FEES

Recovery of attorney's fees by the prevailing parties in cases involving "any civil action to recover on ...note...and any commercial transaction" is provided for by I.C. Section 12-120(3). The phrase "commercial transaction" is defined in the statute to embrace "all transactions except transactions for personal or household purposes." I.C. Section 12-120(3); Vreeken v. Lockwood Engineering, B.V. 148 Idaho 89, 111, 218 P.3d 1150, 1172 (2009). In that Plaintiff is seeking declaration of an equitable trust, it only follows that he seeks establishment of an equitable promissory note, as the claimed debt. Awards to defendant who successfully defend against such claims are clearly authorized by the statute. Shore v. Peterson, 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009) A party to an action involving a commercial transaction who is the prevailing party on appeal is entitled to an award of fees on appeal under the statute. Grover v. Wadsworth, 147 Idaho 60, 66, 205 P.3d 1196, 1202 (2009)

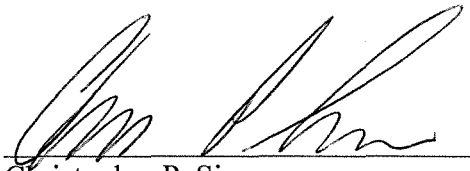
The critical test in determining whether a civil action is for a commercial transaction is whether the commercial transaction comprises the gravamen of the lawsuit; it must be integral to the claim and constitute the basis upon which the party is attempting to recover. Johannsen v. Utterbeck, 146 Idaho 423, 196 P.3d 341 (Idaho 2008) The Court found a transaction involving real estate development, to be a commercial

transaction. Similarly, the heart of this case deals with a real estate transaction, the end game of which is commercial development.

VI.

CONCLUSION

This Court is to exercise free review of the issues presented. The District Court failed to correctly state applicable, and therefore its conclusions of law are not sustained by the facts. Likewise, the District Court failed to identify and analyze the applicable presumptions of law. Clearly, the transaction between the parties was not mutually agreed to be a mortgage, but exactly what the deeds in question purported to be, a conveyance of fee simple interest in the subject property to appellant. The law and equity support reversal of the District Court's Order and Judgment.



Christopher P. Simms
Attorney for Defendant - Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8TH day of November 2012, pursuant to I.A.R. 34(a), I caused a true and correct copy of the foregoing document, APPELLANT'S BRIEF, to be served to the following parties as addressed and delivered to each by US Mail, Postage Pre-Paid:

Original and six (6) bound copies, plus one (1) unbound copy:

The Clerk of the Supreme Court
PO Box 83720
451 West State Street
Boise, Idaho, 83720-0101

Two (2) copies:

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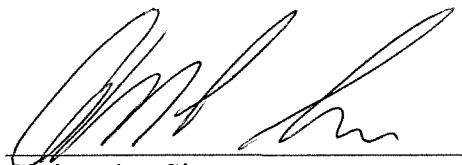

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